STATE OF MICHIGAN

COURT OF APPEALS

TRI-MOUNT/PRESERVES BUILDING COMPANY, INC., TRI-M PRESERVE, L.L.C., and TRI-MOUNT MANAGEMENT COMPANY, INC.,

Plaintiffs-Appellants,

v

TCF NATIONAL BANK, LARRY MICHAEL CZEKAJ, GARY P. MACH, and GOLF COURSE PROPERTIES, L.L.C.,

Defendants-Appellees.

UNPUBLISHED
October 4, 2005

No. 254077
Oakland Circuit Court
LC No. 2003-049035-CK

Before: Saad, P.J., and Jansen and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

Plaintiffs are related corporate entities that were involved in the development of a residential subdivision on a seventy-two-lot parcel in Livingston County. Defendant TCF National Bank ("TCF") held a mortgage on the parcel. Plaintiffs defaulted on the mortgage loan in 2001, and TCF purchased the parcel at a foreclosure sale in January 2002. Plaintiffs failed to redeem the property during the statutory redemption period. Defendant Larry Czekaj, TCF's vice president, negotiated with plaintiffs' owner, John Vincenti, to restructure plaintiffs' debt and enable plaintiffs to repurchase the parcel on land contract, but they failed to agree on a mutually acceptable set of terms. On September 23, 2002, Czekaj sent Vincenti a letter setting forth TCF's terms for approving the sale to plaintiff. On October 16, 2002, before Vincenti responded, TCF withdrew the offer.

Plaintiffs subsequently filed this action, alleging claims for "promissory fraud," specific performance, promissory estoppel, breach of covenant of good faith/fair dealing, tortious interference with a contract or business expectancies, and conspiracy. Defendants, relying on the statute of frauds, moved for summary disposition of all six counts pursuant to MCR 2.116(C)(8) and (10). The trial court granted defendants' motion, explaining:

> I will tell you that I looked at all of these letters. I looked to see if there was some type of meeting of the minds even that took place, notwithstanding the letters. And there were definitely a lot of negotiations. There were a lot of notations. There were lists of terms and honestly, I don't know what role Mr. Vinscenti's [sic] trip to Europe played in this, but it looks like there was a delay during which the Defendant sent a letter and said we're no longer interested. Most convincing, however, is Mr. Vinscenti's testimony. He's the president and the founder of the Plaintiff's [sic]. He admitted, in his deposition testimony, the parties never finalized an agreement, nor was an agreement reduced in writing with all of the necessary terms. And that is why I asked whether any of the letters were signed by both parties. I know that you can create a kind of an ugly contract, if you will, by having another party sign a letter with an offer, but that didn't happen in this case. And I find that all six of these counts fail for those reasons. There are also statute of frauds questions with respect to Counts II and III. So I am granting summary disposition as to all six counts.

This Court reviews de novo a trial court's resolution of a motion for summary disposition. *Veenstra v Washtenaw Country Club*, 466 Mich 155, 159; 645 NW2d 643 (2002). A motion under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Adair v State of Michigan*, 470 Mich 105, 119; 680 NW2d 386 (2004). The reviewing court accepts all well-pleaded factual allegations as true and construes them in a light most favorable to the non-moving party. *Id.* The motion may be granted only where the claims alleged are so clearly unenforceable as a matter of law that no factual development could possibly justify recovery. *Id.* A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Kraft v Detroit Entertainment, LLC*, 261 Mich App 534, 539; 683 NW2d 200 (2004). The trial court must consider the affidavits, pleadings, depositions, admissions, and any other evidence submitted by the parties in a light most favorable to the nonmoving party. *Id.* at 539-540. Summary disposition should be granted if there is no genuine issue of any material fact and the moving party is entitled to judgment as a matter of law. *Id.* at 540; MCR 2.116(C)(10) and (G)(4).

Here, plaintiffs' specific performance and promissory estoppel claims fail as a matter of law because plaintiffs cannot satisfy the statutory requirement of a signed and written memorandum of a contract to convey an interest in real estate. MCL 566.108 provides, in pertinent part:

> Every contract for the leasing for a longer period than one year, or for the sale of any lands, or any interest in lands, shall be void, unless the contract, or some note or memorandum thereof be in writing, and signed by the party by whom the lease or sale is to be made, or by some person thereunto by him lawfully authorized in writing . . . .

In *Eerdmans v Maki*, 226 Mich App 360, 364-365; 573 NW2d 329 (1997), this Court held:

> A valid contract requires mutual assent on all essential terms. . . . Mere discussions and negotiation cannot be a substitute for the formal requirements of a contract. . . . Before a contract can be completed, there must be an offer and acceptance. . . . An offer is defined as the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his

> assent to that bargain is invited and will conclude it. . . . Acceptance must be unambiguous and in strict conformance with the offer. . . . Finally, a contract for the sale of land must also satisfy the statute of frauds. . . . To satisfy the statute of frauds, there must be a writing signed by either (1) the party making the sale or (2) a person lawfully authorized in writing to act on behalf of the person making the sale. [Citations and internal quotation marks omitted.]

Plaintiffs clearly cannot satisfy the writing requirement. Vincenti and Czekaj never achieved mutual assent to all essential terms in the correspondence that they exchanged between July and October 2002. Vincenti and Czekaj both proposed terms for a mutually acceptable arrangement, but never achieved one. Czekaj set forth conditions that plaintiffs would have to satisfy before TCF would sell the parcel on land contract, but plaintiffs never signed Czekaj's September 23, 2002, letter, or any other writing demonstrating acceptance of those terms.

Plaintiffs attempt to avoid MCL 566.108 by arguing that summary disposition was improper because continued discovery might reveal more about the parties' intent during negotiations. However, the statute unequivocally requires a *signed writing*, and plaintiffs have failed to produce one. Additional depositions cannot ameliorate that failure. Plaintiffs correctly state that MCL 566.108 does not impose rigid requirements on the form of the written contract, but this is not helpful to their position. Although our Supreme Court has declined to adopt rigid rules for compliance with the statute of fraud, *Forge v Smith*, 458 Mich 198, 206; 580 NW2d 876 (1998); *Opdyke Investment Co v Norris Grain Co*, 413 Mich 354, 367; 320 NW2d 836 (1982), plaintiffs have failed to produce any writing that satisfies the basic requirement of a signed note or memorandum evincing both parties' agreement on essential terms. Plaintiffs argue that TCF's September 23, 2002, letter stated the material terms of the sale. As indicated previously, however, plaintiffs never signed the letter or any other writing demonstrating an acceptance of those terms.

Plaintiffs also argue that defendants erroneously relied on MCL 566.132(2) as additional support for their statute of frauds defense. MCL 566.132(2) provides:

> Action to enforce promises or commitments, conditions for bringing. An action shall not be brought against a financial institution to enforce any of the following promises or commitments of the financial institution unless the promise or commitment is in writing and signed with an authorized signature by the financial institution:
>
> (a) A promise or commitment to lend money, grant or extend credit, or make any other financial accommodation.
>
> (b) A promise or commitment to renew, extend, modify, or permit a delay in repayment or performance of a loan, extension of credit, or other financial accommodation.

Plaintiffs argue that this statute does not apply because the alleged contract concerned the sale of land, not the extension of credit. This argument lacks merit, because plaintiffs' purchase of the parcel from TCF depended on TCF granting plaintiffs credit after plaintiffs defaulted on the prior loan and TCF foreclosed. The sale of the land was intertwined with the extension of credit, and

plaintiffs cannot logically ignore the financing aspect of the deal. In any event, even if MCL 566.132(2) did not apply, the alleged contract was still unenforceable under MCL 566.108.

Plaintiffs also argue that the equitable doctrine of promissory estoppel preserves "the substance of the contract," even if the contract is unenforceable under the statute of frauds. The elements of promissory estoppel are: (1) a promise, (2) that the promisor should reasonably have expected to induce action of a definite and substantial character on the part of the promisee, and (3) that in fact produced reliance or forbearance of that nature in circumstances such that the promise must be enforced if injustice is to be avoided. *Novak v Nationwide Mut Ins Co*, 235 Mich App 675, 686-687; 599 NW2d 546 (1999). Plaintiffs have not cited any authority in support of their position that promissory estoppel can be applied to enforce an unwritten contract involving an interest in real property, in avoidance of the statute of frauds. A party's failure to cite authority in support of its position waives the issue on appeal. *People v Weathersby*, 204 Mich App 98, 113; 514 NW2d 493 (1994). Further, it does not appear that Michigan law permits application of promissory estoppel in this context. *Hazime v Martine Oil of Indiana, Inc*, 792 F Supp 1067, 1069 (ED Mich, 1992). We therefore conclude that plaintiffs cannot rely on promissory estoppel to avoid the statute of frauds.

Plaintiffs also argue extensively that the trial court erred in finding that no "meeting of the minds" existed as a matter of law before the conclusion of discovery. Without a writing to satisfy the statute of frauds, however, plaintiffs could not prevail in this action even if they could show that Vincenti and Czekaj verbally agreed on the contractual terms. In any event, the trial court did not err in finding no genuine issue of material fact on this issue. Although Vincenti testified in his deposition that he believed that he and Czekaj would eventually consummate the deal, he admitted several times that he and Czekaj never agreed to a set of mutually acceptable terms.

Viewing the evidence in a light most favorable to plaintiffs, there was no genuine issue of material fact concerning the existence of an enforceable contract for the sale of the parcel. Plaintiffs failed to satisfy the statute of frauds, and failed to raise any legally viable alternative to producing a signed, written agreement. Accordingly, the trial court properly granted summary disposition for defendants on the specific performance and promissory estoppel claims.[1]

Affirmed.

/s/ Henry William Saad
/s/ Kathleen Jansen
/s/ Jane E. Markey

[1] Plaintiffs do not challenge the trial court's dismissal of the remaining counts.